No. 88-1797

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GOETHE HOUSE NEW YORK,
GERMAN CULTURAL CENTER,

Petitioner,

— VS. —

NATIONAL LABOR RELATIONS BOARD; JAMES M. STEPHENS, individually and in his capacity as Chairman of the National Labor Relations Board, WILFORD W. JOHANSEN, MARY MILLER CRACRAFT, JOHN E. HIGGINS, JR. and DENNIS DEVANEY, individually and in their capacity as Members of the National Labor Relations Board; and DANIEL J. SILVERMAN, individually and in his capacity as Regional Director of the NATIONAL LABOR RELATIONS BOARD, REGION 2,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, due to direct implications of an international nature, the district court had jurisdiction pursuant to *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611, or both, to enjoin the National Labor Relations Board from conducting a representation election among the employees of Petitioner, which functions as a branch of the Federal Republic of Germany?

LIST OF PARTIES

The parties to the proceedings below were Petitioner-Appellee Goethe House New York, German Cultural Center ("Goethe House"), and Respondents-Appellants: the National Labor Relations Board; James M. Stephens, individually and in his capacity as Chairman of the National Labor Relations Board, Wilford W. Johansen, Marshall B. Babson, and Mary Miller Cracraft individually and in their capacity as Members of the National Labor Relations Board; and Daniel J. Silverman, individually and in his capacity as Regional Director of the National Relations Board, Region 2 (collectively the "Board").[1]

LISTING PURSUANT TO RULE 28.1

Goethe House New York, German Cultural Center has no parent companies, subsidiaries or affiliates.

[1] The caption in this case has been changed to reflect the substitution of parties pursuant to Rule 40.3 of the Rules of the Supreme Court of the United States.

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REFERENCE TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 869 F.2d 75,[2] and is reprinted in the Appendix at A-1.[3] The memorandum decision of the United States District Court for the Southern District of New York (Owen, D.J.) is reported at 685 F. Supp. 427, and is reprinted in the Appendix at A-16.

STATEMENT OF GROUNDS OF JURISDICTION

The order sought to be reviewed was entered on February 16, 1989.

This Court has jurisdiction to review the order of the Court of Appeals for the Second Circuit by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The National Labor Relations Act ("NLRA"), 29 U.S.C. §§151-160, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602-1611. The pertinent text of these statutes is reprinted in the Appendix at A-22-41.

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[2] The Second Circuit's slip opinion is reprinted in the Appendix, since the official reported opinion was not available at the time of the printing of this Petition.

[3] References herein to "A-____" pages are to pages in the Appendix of this petition.

STATEMENT OF THE CASE

A. Petitioner Is A Branch Of The Federal Republic Of Germany

The Foreign Office of the Federal Republic of Germany (the "Foreign Office") is constitutionally responsible, *inter alia*, for furthering German culture abroad. (A-3, 13, 17; Ohlau Aff.).[4] The Foreign Office has delegated to the Goethe Institute, parent organization of Goethe House, significant duties in the realm of German cultural foreign policy. Goethe House serves the Foreign Office exclusively in that capacity and, as an instrumentality of the Foreign Office, Petitioner promotes the dissemination of German culture and international cultural cooperation. (A-3, 13, 17; Ohlau Aff.). Goethe House accomplishes this mission by engaging in the following noncommercial conduct: (1) presenting and arranging cultural events; (2) providing information on cultural life in the Federal Republic of Germany ("Federal Republic"); (3) assisting foreign visitors to and from the Federal Republic; and (4) participating in other forms of cultural cooperation, including exchange programs, pursuant to the direction of the German Foreign Office. (Ohlau Aff.).[5]

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[4] References herein to "Ohlau Aff." are to the Affidavit of Dr. Juergen Uwe Ohlau, Director of Petitioner, dated May 4, 1988, contained in the record below.

[5] Similarly, the United States Government operates seven America Houses, branches of the United States Information Agency, in the Federal Republic of Germany. America Houses have functions similar to those of Goethe House. Almost all of the America Houses in the Federal Republic employ two American Nationals. Each America House also employs between seven and thirteen German Nationals. The German employees of the America Houses are not represented by either a German or an American union. *Neither the United States Information Agency nor the America Houses will recognize a German union as the collective bargaining representative of these German Nationals. Moreover, prior to commencing employment with an America House, a German National must pledge that he or she relinquishes the right to strike.*

Petitioner is exclusively funded by the Federal Republic and is subject to the same reporting and financial regulations applicable to all other branches and departments of the German Government. (A-3, 17; Ohlau Aff.). The Federal Republic asserts broad, organizational control over Petitioner and its operations, including control of every aspect of Goethe House's employee relations. (A-3, 17-19; Ohlau Aff.). The Foreign Office retains the right to veto any resolution or decision with which it disagrees and also dictates the number of individuals Petitioner may employ, their positions, and all terms and conditions of employment, including wages and benefits. (Ohlau Aff.). For example, the Foreign Office can mandate or demand the dismissal of any employee whose conduct, in its opinion, might injure the Federal Republic or relations between the Federal Republic and any host nation. (Ohlau Aff.).

Accordingly, as "an agency or instrumentality of the Federal Republic of Germany," (A-18) and "a conceded arm of a foreign state," (A-20) Petitioner is not subject to the jurisdiction of the United States courts or administrative agencies under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611. (A-13).

B. The Administrative Proceedings Below

On March 5, 1982, District 65, International Union, United Automobile, Aerospace and Agricultural Workers of America, AFL-CIO filed a representation petition with Region 2 of Respondent National Labor Relations Board, seeking to represent a unit of individuals employed by Goethe House. (A-3). At the conclusion of the April, 1982 hearing on the petition, Goethe House moved to transfer the matter from the Regional Director to the Board in Washington, D.C., for a decision on the issue of whether Goethe House was subject to the Board's jurisdiction. *See* 29 C.F.R. §102.67(h). (A-4). By order dated May 12, 1982, the Board granted the motion *on the grounds that the matter presented issues with international implications.* (A-4; Ohlau Aff.).

On March 29, 1988, almost six years after it received this matter, the Board issued its Decision and Direction of Election.

Goethe House New York, German Cultural Center, 288 NLRB No. 29 (1988). (A-4). In that determination, the Board found that it had jurisdiction over Goethe House and that an election should be conducted. On May 6, 1988, the Regional Director of Region 2 directed that an election be held among Goethe House's employees on June 3, 1988. (A-4).

C. The Present Action

On May 18, 1988, Petitioner commenced the present action in the United States District Court for the Southern District of New York, seeking declaratory and injunctive relief, pursuant to 28 U.S.C. §§1331, 1337 and 1651. (A-4). Petitioner sought a judgment that the Board lacks jurisdiction over Petitioner on the grounds that: (1) the FSIA, 28 U.S.C. §§1602-1611, prohibits United States governmental interference with the operations of an instrumentality of a foreign government; and (2) the international nature and effect of the issues involved prohibits assertion of jurisdiction by the Board. Goethe House also sought to enjoin the Board from conducting the representation election.

Petitioner argued that direct judicial intervention was appropriate and necessary because its unique position as an instrumentality of a foreign sovereign and the international complexion of the interests at stake established extraordinary circumstances under *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).[6] Such relief was also warranted, it argued, under the FSIA.

On May 19, 1988, the district court (per Wyatt, D.J.) issued a temporary restraining order halting the election. (A-4). A preliminary injunction followed on June 7, 1988. In granting the preliminary injunction, the district court (per Owen, D.J.) reasoned that:

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[6] Absent such exceptional circumstances, a Board representation order, as well as a challenge to the Board's assertion of jurisdiction, are reviewable only through a proceeding in a Circuit Court of Appeals, after the Board finds that the employer has committed unfair labor practices in violation of the NLRA. *See American Fed. of Labor v. NLRB*, 308 U.S. 401 (1940); 29 U.S.C. §§160(e), (f); (A-5-6).

(1) The district court had jurisdiction to entertain Petitioner's request for a preliminary injunction under *McCulloch*, 372 U.S. 10. (A-5, 18-19).

(2) Requiring Petitioner, whose activities, including staffing and establishing employment policies, are controlled entirely by the German Government, "to submit to the Board's jurisdiction might well conflict or otherwise interfere with the Federal Republic of Germany's employment objectives in implementing cultural foreign policy" and that "[s]uch entanglement in a foreign government's policy objectives is clearly not within the scope of administrative agency jurisdiction, and might well 'raise considerable disturbance. . . in our international relations' and 'lead to embarrassment in foreign affairs.' 372 U.S. at 19." (A-5, 18-19, footnote omitted).

(3) A denial of injunctive relief, resulting in Petitioner having to participate in the election, would undoubtedly cause Goethe House and the Federal Republic irreparable harm in the sensitive area of foreign relations and could lead to diplomatic embarrassment. (A-5, 19).

(4) Petitioner demonstrated the likelihood of success on the merits of its claim since it showed that ordering a representation proceeding would violate Goethe House's immunity from judicial or administrative proceedings as a foreign instrumentality under the FSIA, 28 U.S.C. §§1602-1611, and there is no justification for a United States agency's intervention into the underlying employment structure of a conceded arm of a foreign state that is not involved in commercial activity. (A-5, 20-21).

(5) Since Petitioner demonstrated that it would suffer irreparable harm in the absence of a preliminary injunction, and in view of the likelihood of success on the merits of its claim, a preliminary injunction should issue. (A-5, 17, 20-21).

The Board appealed and a divided panel of the court of appeals (Lumbard, C.J. dissenting) reversed. Viewing this Court's holding in *McCulloch*, 372 U.S. 10, narrowly, the majority found no justification for the district court's assertion of jurisdiction.

(A-8-10, 12-13). Because of its holding, the majority did not address whether the preliminary injunction was otherwise proper. (A-5). Additionally, although the court of appeals did not specifically address the FSIA, 28 U.S.C. §§1602-1611, it found that all aspects of Goethe House's operations, including its terms and conditions of employment, are regulated by the Federal Republic. (A-3).

In his dissent, Judge Lumbard expressed his opinion that the international complexion of this suit provided the district court with a compelling justification to hear the case, to-wit:

> The question of whether the FSIA renders Goethe House immune to the jurisdiction of United States administrative agencies such as the Board is one that should be resolved speedily to avoid possible disturbances and embarrassment in our international relations. Today's decision forces Goethe House to commit an unfair labor practice by refusing to bargain with the unit's certified bargaining representative in order to obtain review of the Board's exercise of jurisdiction. If there is a basis for the refusal, such proceedings should be avoided.

(A-14). Goethe House petitions for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

POINT I

A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES RELATING TO INTERNATIONAL RELATIONS AND FEDERAL LABOR LAW

The Second Circuit's decision forces a branch of a foreign sovereign engaged in non-commercial political activity to submit to the Board's authority and incur a United States Government agency's finding that it has violated domestic law by refusing to bargain with a union, in order to obtain a determination that the Board lacked jurisdiction to begin with. *See American Fed. of Labor v. NLRB*, 308 U.S. 401 (1940). Moreover, it permits the Board, an agency with no role or expertise in the delicate area of international relations, to interpret the FSIA, 28 U.S.C. §§1602-1611, and interfere with a foreign government's political mission of promoting and formulating its cultural policy.

The implications of the Second Circuit's decision are daunting. Requiring Goethe House to violate the NLRA will lead to embarrassment in foreign affairs for both the United States and the Federal Republic. *McCulloch*, 372 U.S. 10; *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971). The international complexion of this case sets it apart from wholly domestic labor disputes. Thus, procedures set forth in the NLRA for the indirect review of Board certifications of bargaining representatives were never intended to apply to an arm of a foreign sovereign.

POINT II

PROPER APPLICATION OF THE RULE IN *MCCULLOCH*, 372 U.S. 10, ENABLES A FOREIGN SOVEREIGN TO OBTAIN DIRECT JUDICIAL REVIEW OF A BOARD REPRESENTATION PROCEEDING IN DISTRICT COURT

This Court's holding in *McCulloch* is predicated on the principle that the Board's intrusion into the affairs of a foreign government should be avoided. 372 U.S at 17. It thus recognizes a limited exception to the NLRA procedures for review of Board representation determinations. This case fits squarely within that exception.

The international complexion of this case presents "compeling justification for prompt judicial resolution of the controversy over the Board's power," which was the standard recognized in *McCulloch. Id.* Indeed, the facts of this case are even more compelling than those in *McCulloch*. There, the Board attempted to assert jurisdiction over a vessel owned by a foreign corporation. Here, the Board has asserted jurisdiction over a branch of a foreign government that engages in political, non-commercial activity. The dangers identified in *McCulloch*, of "sanction[ing] the exercise of local sovereignty. . . in this 'delicate field of international relations absent the affirmative intention of Congress clearly expressed' ", are therefore far more evident here. 372 U.S. at 21-22 (citation omitted).

The Board has never before tried to assert jurisdiction over an instrumentality of a foreign sovereign engaged in a non-profit-making governmental mission. (A-14-15.) Before the Board's conduct is allowed to affect the Federal Republic's governmental operations and to disturb the delicate balance of international relations, Petitioner must be afforded an opportunity for immediate judicial intercession. Otherwise, it will have no satisfactory recourse.

Upon the Board's exercise of jurisdiction, Goethe House, as an instrumentality of a foreign sovereign, will be forced to

surrender its immunity from unnecessary entanglements with this host country's laws and regulations. This violation would not be remedied even if Petitioner were to win the election, since: (1) absent litigation over allegations of unfair labor practices, there would be no circuit court review; and (2) mere submission, however limited, to the Board's administrative processes, entrenches upon Petitioner's protected immunity as a sovereign.

McCulloch, 372 U.S. 10, strikes a fair balance between the mandated duties of an administrative agency and the protection afforded a sovereign from interference by another nation with its non-commercial governmental operations. That Supreme Court precedent requires a district court to protect Goethe House from interference with its sovereign function, and at the same time, preserves the statutory scheme of the NLRA, 29 U.S.C. §§151-160. The Second Circuit incorrectly spurned that precedent.

Consequently, this Court should grant a writ of certiorari to reaffirm *McCulloch*, 372 U.S. 10, and to correct the decision of the court below.

POINT III

THE FOREIGN SOVEREIGN IMMUNITIES ACT APPLIES TO GOETHE HOUSE, A BRANCH OF THE FEDERAL REPUBLIC OF GERMANY

In 1976, Congress codified the restrictive theory of foreign sovereign immunity in the FSIA.[7] That legislation was enacted to ensure that determinations of such immunity occur in the federal courts, instead of the executive branch, in order to depoliticize such decisions. 28 U.S.C. §1602; *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. Admin. News 6604, 6605. The FSIA states that, except as provided in international agreements and specific provisions of the FSIA, "a foreign state [which under 28 U.S.C. §1603 (a), includes its agencies or instrumentalities] shall be immune from the consideration of the jurisdiction of the Courts of the United States and of the states. . . ." 28 U.S.C. §1604. Thus, the FSIA starts from the premise of immunity and then creates exceptions to that general principle. *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale de Algerienne de Navigation*, 730 F.2d 195, 203 (5th Cir. 1984). Yet, despite agreement by the courts below and the Board that Goethe House is an instrumentality of the Federal Republic and acts in furtherance of a non-commercial governmental mission,[8] the Second Circuit ignored the FSIA, and the aforementioned congressional directive, in rendering its decision.

Further, the Second Circuit did not comply with the congressional mandate that in addressing cases where a sovereign is a party, the judiciary must begin with the premise of immunity

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[7] Under this principle the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts. H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 6604, 6605.

[8] Thus, Goethe House is distinguishable from the commercial bank involved in *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3229 (1987).

before proceeding to consider exceptions to this principle. *Argentine Republic v. Amerada Hess Shipping Corp.*, ____ U.S. ____, 109 S.Ct. 683, 688 (1989). To the contrary, the Second Circuit reached its decision without even considering the issue of foreign sovereign immunity or the implications that its decision would have on critical national interests.

The risk that the Board's exercise of jurisdiction will compromise the Federal Republic's abilities to carry out its sovereign functions is real. Unless Goethe House is afforded prompt judicial resolution by a district court of the Board's exercise of jurisdiction, the Board will become enmeshed in the internal management and affairs of a branch of the Federal Republic of Germany.

The mere assertion of jurisdiction by the Board will permit the Board to become involved in matters that are exclusively the concerns of a foreign sovereign. For example, the Federal Republic's unfettered control of Goethe House's employee relations will be thwarted should Goethe House be required to bargain with an American union regarding its employees' terms and conditions of employment. Moreover, personnel decisions, which directly affect Goethe House's sovereign mission and its operations as a branch of the Federal Republic, would be subject to the collective bargaining and grievance and arbitration process rather than to the desires and needs of its Government. Additionally, international cultural exchange and the reciprocal promotion of German and American cultural policy could be hampered.

The FSIA provides that such entanglement with a foreign government's policy objectives is not within the scope of administrative agency jurisdiction. *See* 28 U.S.C. §§1602, 1604.

CONCLUSION

For reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
May 4, 1989

Respectfully submitted,

JACKSON, LEWIS, SCHNITZLER
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 281—August Term, 1988

(Argued: October 20, 1988 Decided: February 16, 1989)

Docket No. 88-6156

GOETHE HOUSE NEW YORK,
GERMAN CULTURAL CENTER,

Plaintiff-Appellee,

—v—

NATIONAL LABOR RELATIONS BOARD, JAMES M. STEPHENS, individually and in his capacity as chairman of the National Labor Relations Board, WILFORD W. JOHANSEN, MARSHALL B. BABSON and MARY MILLER CRACRAFT, individually and in their capacity as Members of the National Labor Relations Board, and DANIEL J. SILVERMAN, individually and in his capacity as Regional Director of the NATIONAL LABOR RELATIONS BOARD, REGION 2,

Defendants-Appellants.

Before: —

LUMBARD, CARDAMONE, and PIERCE,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Owen, Judge) which granted petition for a preliminary injunction enjoining National Labor Relations Board from conducting a representation election for appellee's non-German employees.

Reversed.

DIANE ROSSE, Attorney, National Labor Relations Board, Washington, D.C. (Margery E. Lieber, Assistant General Counsel for Special Litigation, Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, National Labor Relations Board, Washington, D.C., of counsel), *for Defendants-Appellants*.

JAMES R. WILLIAMS, Esq., New York, N.Y. (Penny Ann Lieberman, Jackson, Lewis, Schnitzler & Krupman, New York, N.Y., of counsel), *for Plaintiff-Appellee*.

PIERCE, *Circuit Judge*:

Appellant National Labor Relations Board ("the Board") appeals from an order of the United States District Court for the Southern District of New York, Judge Richard Owen, which granted the petition of appellee

Goethe House New York, German Cultural Center ("Goethe House"), for a preliminary injunction enjoining the Board from conducting a representation election for Goethe House's non-German employees. The district court lacked jurisdiction to review the Board's order which directed that the election be held; therefore, we reverse.

BACKGROUND

Goethe House is one of 114 branches of the worldwide Goethe Institute for Promoting the Study of German Language Abroad and for International Cultural Cooperation ("Goethe Institute"). Goethe Institute, a nonprofit organization, is under contract with the Foreign Office of the Federal Republic of Germany ("West Germany") to promote German culture around the world. Funding for Goethe Institute comes exclusively from the government of West Germany. The West German government regulates the activities of Goethe Institute and its branches, including those of Goethe House. In particular, the Foreign Office of West Germany regulates the number of employees Goethe House hires and fires, the wages those employees receive and the duties they perform.

On March 5, 1982, District 65, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("the Union") filed a representation petition with Region Two of the Board, seeking certification as representative of Goethe House's non-German and non-managerial employees. The unit of employees the Union sought to represent consisted of a bookkeeper, an assistant librarian, an administrative assistant, a secretary, a messenger, a custodian and a maintenance worker. All of these employees were either United

States citizens or nationals of nations other than Germany. The Goethe House employees who are German nationals are represented by a German union.

In March and April 1982, a hearing on the representation petition was held before a Board hearing officer for Region Two. Goethe House took the position that under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1982), it was immune from the Board's jurisdiction and therefore the Board lacked the power to order a representation election for Goethe House's non-German employees. On May 12, 1982, the Board granted Goethe House's motion to have the case transferred to the Board's national office in Washington, D.C.

On March 29, 1988, the Board issued a decision in which it held that it had jurisdiction over Goethe House. 288 N.L.R.B. No. 29, at 12. The Board directed that an election be held to determine whether Goethe House's non-German employees wished to be represented by the Union. *Id.* at 13. On May 6, 1988, the Regional Director of Region Two of the Board ordered an election to be held on June 3.

On May 18, 1988, Goethe House filed a complaint in the United States District Court for the Southern District of New York, seeking a judgment declaring that the Board lacked jurisdiction over Goethe House and an injunction enjoining the Board from holding a representation election for Goethe House's non-German employees. The next day, following a hearing, Judge Inzer Wyatt issued a temporary restraining order prohibiting the Board from holding the election.

On May 26, 1988, Judge Owen heard oral argument on Goethe House's petition for a preliminary injunction. In a memorandum and order dated June 7, 1988, Judge Owen

granted the preliminary injunction. Ruling on a threshold issue, the district court held that it had jurisdiction to review the Board's order directing that the election be held. As justification for its assertion of jurisdiction, the district court wrote that

> [r]equiring Goethe House to submit to NLRB jurisdiction might well conflict or otherwise interfere with the German government's employment objectives in implementing cultural foreign policy. Such entanglement in a foreign government's policy objectives is clearly not within the scope of administrative agency jurisdiction, and might well "raise considerable disturbance . . . in our international relations" and "lead to embarrassment in foreign affairs." 372 U.S. at 19.

(Footnotes omitted.) The district court granted the preliminary injunction on the grounds that Goethe House would suffer irreparable harm in the absence of the injunction and that Goethe House would likely succeed on the merits of its claim that it was exempt from the Board's jurisdiction.

On appeal, the Board argues that the district court (1) lacked jurisdiction to enjoin the representation election and (2) erred in holding that the requirements for a preliminary injunction had been met. Since we reverse the district court on the first issue, we do not reach the second issue.

DISCUSSION

Generally, Board orders in representation proceedings are not directly reviewable in court. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476 (1964). As a rule, to obtain judicial review of such an order, an employer must refuse to

bargain with the union after the union has been certified, and then argue its case in a court of appeals after the Board has found the employer to have committed an unfair labor practice. *See id.* at 477. In only two cases, *Leedom v. Kyne*, 358 U.S. 184 (1958), and *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), has the Supreme Court held that a district court has jurisdiction to review a Board order in a representation proceeding. *Boire*, 376 U.S. at 479-80; *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1311 (D.C. Cir. 1984). Goethe House argues that herein the district court had the authority to enjoin the representation election under either *Kyne* or *McCulloch*.

A. *The Kyne Exception*

In *Kyne*, the Board included professional and non-professional employees in the same bargaining unit, without first canvassing the professional employees to determine whether a majority of them favored inclusion in such a unit, even though § 9(b)(1) of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 159(b)(1), explicitly forbade the inclusion of non-professional and professional employees in the same unit unless a majority of the professional employees voted for such inclusion. 358 U.S. at 184-85. In upholding the district court judgment which set aside the Board's determination of the bargaining unit, the Supreme Court wrote that the Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.* at 188.

In *Kyne*, the Court established an "extremely narrow exception to the general rule that Board representation orders are not subject to direct judicial review." *Hartz*, 727 F.2d at 1311. This exception applies "[o]nly where the Board has clearly violated an express provision of the stat-

ute." *Id.* at 1312 (quoting 2 *The Developing Labor Law* 1717-18 (C. Morris ed., 2d ed. 1983)).

Here, Goethe House does not argue that the Board violated "a specific prohibition in the [NLRA]." *Kyne*, 358 U.S. at 188. Citing *Kyne*, Goethe House argues instead that the Board, by asserting jurisdiction over Goethe House, acted in excess of its statutory mandate and in contravention of the Foreign Sovereign Immunities Act. Under *Kyne*, however, a district court does not have jurisdiction to review a Board order in a representation proceeding whenever that order may violate any statute; the district court has jurisdiction only when the order violates a specific prohibition of the NLRA. The Board's order here did not violate a specific prohibition of the NLRA and thus we conclude that *Kyne* provides no support for the district court's assertion of jurisdiction in this case.

B. *The McCulloch Exception*

McCulloch, 372 U.S. 10, upon which the district court here relied for its assertion of jurisdiction, forms the second exception to the general rule that Board orders in representation proceedings are not directly reviewable. In *McCulloch*, the Board ordered an election after an American union sought certification as the representative of the crew members of certain vessels owned by a Honduran corporation. *Id.* at 12-13. A Honduran union already represented the crew members, *id.* at 14, all except one of whom were Honduran citizens, *id.* at 13. Moreover, under Honduran law, only a union recognized by Honduras and at least ninety percent of whose members were Honduran citizens could represent crew members on Honduran ships. The American union met neither of these legal requirements. *Id.* at 14.

The Supreme Court found that if the American union became the crew members' bargaining agent, a "head-on collision" with the Honduran union might result. *Id.* at 21. The Court wrote that even if the Honduran union did not contest the American union's position as representative of the crew members, the American union's position, which would violate Honduran law, would "invite retaliatory action from other nations as well as Honduras." *Id.* In holding that the district court had jurisdiction to review the Board's order, the Court wrote that

> the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government . . . . [T]he presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power.

Id. at 16-17.

Like *Kyne*, *McCulloch* is a case involving "extraordinary circumstances." *Boire*, 376 U.S. at 479. The exception which *McCulloch* established is narrow; the Supreme Court did not intend for district courts to have jurisdiction "whenever the Board considers labor disputes having contacts with foreign nations." *National Maritime Union v. NLRB*, 267 F. Supp. 117, 120 n.16 (S.D.N.Y. 1967).

The facts of the present case do not provide a "uniquely compelling justification," *McCulloch*, 372 U.S. at 17, for the district court's assertion of jurisdiction. Here, the Union is not seeking to represent German workers. Certification of the Union as representative of the employees in the bargaining unit would neither encroach on the mem-

bership of a German union nor violate German law. Since we find *McCulloch* to be clearly distinguishable, we conclude that the facts here do not fall within the narrow exception established by *McCulloch* to the general rule that Board orders in representation proceedings are not directly reviewable.

To justify its assertion of jurisdiction, the district court wrote that requiring Goethe House to submit to NLRB jurisdiction might interfere with the West German government's "employment objectives in implementing cultural foreign policy" and might cause disturbances and embarrassment in international relations. In our view, the district court's concerns were largely unfounded and did not warrant the court's intervention in the case. Even if the Union were certified as the bargaining agent of Goethe House's non-German employees, we fail to see how the presence of the Union would interfere with Goethe House's implementation of West German cultural foreign policy. Under the NLRA, Goethe House would have a duty to bargain with the Union over wages, hours and other terms and conditions of employment. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981); 29 U.S.C. § 158(d) (1982). Goethe House would have no duty to bargain over how it performed its mission of promoting German culture. *See Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 883 (D.C. Cir. 1978) (employer need not bargain over issues fundamental to the basic direction of the enterprise). Moreover, the fact that the German employees at Goethe House presently are unionized belies the prospect that the presence of a union for the non-German employees would hamper Goethe House's operations.

While it is true that the Union might interfere with the West German government's "employment objectives," in

the sense that it might deprive that government of the power to unilaterally determine working conditions for Goethe House's non-German employees, we do not believe this loss of unilateral control constitutes a "uniquely compelling justification," 372 U.S. at 17, for the district court to assert jurisdiction, especially since the West German government does not exercise unilateral control over employment conditions for Goethe House's German employees.

We also fail to see how the Board's assertion of jurisdiction would cause disturbances and embarrassment in international relations. In its opinion, the district court did not explain how such disturbances might occur. However, during oral argument, Judge Owen alluded to the possibility that Goethe House's non-German employees might "go on strike . . . [and] carry signs saying the German government is unfair to American workers." Assuming *arguendo* that such a display occurs and results in embarrassment to the West German government, it would be the assertion of the right to strike and picket by Goethe House's non-German employees, and not the Board's assertion of jurisdiction over Goethe House, which would account for the situation.

Whether or not the NLRA is found to apply to relations between Goethe House and its non-German employees, those employees already have the right to strike and to picket peacefully in public areas. In cases in which the NLRA has been found to be inapplicable to a labor dispute because of the dispute's international complexion, the Supreme Court has held that state law may be applied. *See American Radio Ass'n v. Mobile Steamship Ass'n*, 419 U.S. 215, 228 (1974); *Windward Shipping v. American Radio Ass'n*, 415 U.S. 104, 115-16 (1974). Here,

Goethe House's non-German employees are guaranteed the right to strike by New York law. *See Lascaris v. Wyman*, 61 Misc.2d 212, 214, 305 N.Y.S.2d 212, 216 (Sup. Ct. 1969); N.Y. Lab. Law § 703 (McKinney 1988). Moreover, they are guaranteed the right peacefully to picket in public areas by the first amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 98-102 (1940); *Johansen v. San Diego County Dist. Council of Carpenters*, 745 F.2d 1289, 1293 (9th Cir. 1984). Indeed, the effect of the Board's assertion of jurisdiction in this case may well be to lessen, not increase, the chance of strikes and picket lines at Goethe House. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace."); 29 U.S.C. § 151 (1982) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . remov[es] certain recognized sources of industrial strife and unrest . . . .").

In discussing the possible deleterious effects of the Board's assertion of jurisdiction in this case, the district court also noted that "Goethe House points out that the union seeking to represent its non-German employees is part of the AFL-CIO, which has declared its opposition to allegedly restrictive trade policies of various nations, including West Germany." The district court failed to explain the relevance of this fact and we fail to discern any from our review. We are not persuaded by the suggestion that a small number of non-managerial employees at Goethe House might cause international disturbances simply because the union which they may choose to join is

affiliated with a federation of labor unions which, we will assume *arguendo*, opposes West Germany's trade policies.

C. *Indirect Review*

Another aspect of this case which distinguishes it from *Kyne* and *McCulloch* is that here the plaintiff, Goethe House, is an employer. As an employer, Goethe House has the option of seeking indirect review of the Board's order by refusing to bargain with the Union if it is certified, and then seeking review of its position in a court of appeals. In *Kyne*, by contrast, the plaintiff in the district court was a labor organization. As a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action. Because indirect review was unavailable in *Kyne*, the case for direct review was more compelling. Indeed, the District of Columbia Circuit has opined that had the aggrieved party in *Kyne* been an employer and thus able to seek indirect judicial review, the Supreme Court probably would have held that the district court lacked jurisdiction over the case. *Hartz*, 727 F.2d at 1312 n.2 ("[E]quity relief would probably not have been available in *Kyne* had the employer, rather than the union, been contesting the certification.") (quoting 2 *The Developing Labor Law* 1716 (C. Morris ed., 2d ed. 1983)).

In *McCulloch*, the Supreme Court took appeals from two related cases, one initiated in district court by an employer and one initiated by a union. 372 U.S. at 15-16. The Court decided to adjudicate only the union-initiated case, and declined to rule on whether the district court had jurisdiction in the employer-initiated case. *Id.* at 16. We believe it significant that the Court's holding in *McCulloch*, as in *Kyne*, that the district court had jurisdiction, applied to the union-initiated case. Here, since Goethe

House is an employer and can seek indirect review, there was no warrant for the district court to assert jurisdiction.

CONCLUSION

The Board's order violates no specific prohibition of the NLRA and presents no compelling international implications. Moreover, Goethe House can obtain indirect judicial review of the Board's order. Therefore, we reverse the order of the district court.

LUMBARD, *Circuit Judge*, dissenting:

I dissent.

The district court properly exercised its jurisdiction to review the Board's order directing that a representation election be held among the non-German employees of Goethe House; the record supports Judge Owen's grant of a preliminary injunction. There is no doubt that Goethe House, although a private nonprofit association, functions as a branch of the West German government promoting its national culture, a customary activity of foreign governments everywhere. It follows from this that Goethe House is not subject to the jurisdiction of United States courts or administrative agencies under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.* Thus the district court had the authority to review the Board's order mandating a representation election for Goethe House's non-German employees, and, on the undisputed facts, to enjoin such action.

The majority distinguishes the instant case from *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372

U.S. 10 (1963), on the grounds that an American union's representation of the non-German employees at Goethe House would neither encroach on the membership of a foreign union nor violate the foreign sovereign's law, as was the case in *McCulloch*. However, *McCulloch* is predicated on the broad premise that conflicts with foreign sovereigns are to be avoided, not on a technical distinction regarding the identities of the parties to the case. The *McCulloch* Court held that the district court had properly exercised its jurisdiction because the "international complexion" of the issues presented created "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." *McCulloch*, *supra*, at 17. The "international complexion", not the facts narrowly construed, set *McCulloch* and this case apart from wholly domestic labor disputes.

The same compelling justification that was present in *McCulloch* exists here. The question of whether the FSIA renders Goethe House immune to the jurisdiction of United States administrative agencies such as the Board is one that should be resolved speedily to avoid possible disturbances and embarrassment in our international relations. Today's decision forces Goethe House to commit an unfair labor practice by refusing to bargain with the unit's certified bargaining representative in order to obtain review of the Board's exercise of jurisdiction. If there is a basis for the refusal, such proceedings should be avoided.

The Board has not brought to our attention any case in which any United States agency has successfully asserted its jurisdiction over Goethe House or any similar establishment of a foreign government that engages in what so patently are foreign relations activities. I find it inappropriate

to force so indelicate a result in this case, with its extensive foreign relations ramifications.

Judge Owen's determination that Goethe House is not engaged in commercial activity for the purposes of section 1605(2) of the FSIA, 28 U.S.C. § 1605(2), and is therefore rendered immune by that act, is unassailable. Unlike the employer in *State Bank of India v. NLRB*, 808 F.2d 256 (7th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 3229 (1987), Goethe House only sells items incidentally to its central mission, which is to promote German culture in all its manifestations in literature, music, art and other cultural activities. The Board's proposition that the mere hiring of seven non-German employees (among up to 40 German employees) itself manifests commercial activity is not persuasive. It strains logic to suggest that any time a foreign sovereign employs a messenger, a bookkeeper or a custodian, it becomes thereby a commercial enterprise and is subject to the jurisdiction of American administrative agencies.

The district court properly exercised its jurisdiction in this case involving international relations and it certainly did not abuse its discretion when it preliminarily enjoined the representation election, *American Cyanamid Co. v. Campagna per le Farmacie in Italia S.p.A., et al.*, 847 F.2d 53, 55 (2d Cir. 1988) (*per curiam*), *quoting Standard & Poor's Corp., Inc. v. Commodity Exchange, Inc.*, 683 F.2d 704, 708 (2d Cir. 1982). I would affirm the order of the district court.

GOETHE HOUSE NEW YORK
GERMAN CULTURAL CENTER,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD; James M. Stephens, individually and in his capacity as Chairman of the National Labor Relations Board, Wilford W. Johansen, Marshall B. Babson and Mary Miller Cracraft, individually and in their capacity as members of the National Labor Relations Board; and Daniel J. Silverman, individually and in his capacity as Regional Director of the National Labor Relations Board, Region 2,

Defendants.

No. 88 Civ. 3467 (RO).

United States District Court,
S.D. New York

June 7, 1988.

West German employer initiated action seeking to preliminarily enjoin National Labor Relations Board from further processing representation petition or conducting representation elections for non-German employees. The District Court, Owen, J., held that: (1) District Court had jurisdiction to consider injunction request, and (2) employer established both that irreparable harm would result if injunctive relief were not granted and that it was likely to succeed on merits of claim that it was not subject to NLRB's jurisdiction.

Preliminary injunction issued.

MEMORANDUM AND ORDER

OWEN, District Judge:

Plaintiff Goethe House seeks to preliminarily enjoin the National Labor Relations Board from further processing a representation petition or conducting a representation election for plaintiff's seven non-German employees[1] in New York City as ordered on April 15, 1988. For the reasons set forth below, the preliminary injunction is granted.

Goethe House is a not-for-profit organization which promotes German culture and German cultural foreign policy in the United States. It maintains a library and a language department providing teaching materials and curriculum guidance to teachers of German; its cultural programs department sponsors films and lectures about German culture. Goethe House's authority comes from the Foreign Office of the West German government which is the exclusive source of its funding, and it operates under a governmentally imposed budget containing a number of provisions regulating the employment of its German and non-German employees (such as the number of employees to be hired; employees' salaries; and approval procedures for the establishment of new employee lines).

At issue is whether the National Labor Relations Board may order Goethe House to conduct an election for union representation of its non-German employees. Goethe House contends that, as a branch of the West German government promoting cultural foreign policy, it is not subject to the jurisdiction of United States courts or administrative agencies under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, and that review of the NLRB's order is properly before the Court.

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[1] The vast majority of Goethe House's New York City employees are German nationals; their representation is not before this Court. This action involves Goethe House's seven non-German employees: its bookkeeper, assistant librarian, administrative assistant, secretary, messenger, custodian and maintenance person, who are Americans.

The NLRB, while conceding that Goethe House is an "agency or instrumentality of a foreign state" as defined in 28 U.S.C. § 1603(b) and as such it enjoys immunity under the FSIA, nevertheless contends that Goethe House is engaged in "commercial activity" as defined in 28 U.S.C. §§ 1603(d) and 1605(a)(2) in hiring non-German employees, and therefore is not immune from the NLRB's jurisdiction under the "commercial activity" exception. The NLRB further asserts that, since the activities involved do not have international ramifications and the NLRB has not exceeded its statutory mandate under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, in ordering a representation election, the plaintiff has failed to demonstrate a basis for district court jurisdiction. Consequently, the Board asserts that Goethe House must follow the usual procedure for challenging Board action: viz., allowing the representation election to go forward and, in the event that the union should prevail, refusing to bargain with the union as a prerequisite to appellate review. *See Spencer v. NLRB*, 712 F.2d 539, 565 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936, 104 S.Ct. 1908, 80 L.Ed.2d 457 (1984).

[1] As to the threshold jurisdictional question, the Supreme Court has stated that district court review of NLRB orders in certification proceedings is narrowly proscribed and intervention may only occur under "extraordinary circumstances." *Boire v. Greyhound Corp.*, 376 U.S. 473, 479, 84 S.Ct. 894, 898, 11 L.Ed.2d 849 (1964). Such a circumstance is recognized by *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963), in which district court jurisdiction to review NLRB representation orders was permitted in "the presence of public questions particularly high in the scale of our national interest because of their international complexion[.]" *Id.* at 17, 83 S.Ct. at 675. Such internationally sensitive concerns, the Court observed, provide "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power" in the district courts. *Id.* at 16-17, 83 S.Ct. at 674-75.

The facts here, as in *McCulloch*, *supra*, justify such intervention. Goethe House's activities, including its staffing and employment policies, are controlled entirely by the West German

government. Requiring Goethe House to submit to NLRB jurisdiction might well conflict or otherwise interfere with the German government's employment objectives in implementing cultural foreign policy. Such entanglement in a foreign government's policy objectives is clearly not within the scope of administrative agency jurisdiction,[2] and might well "raise considerable disturbance . . . in our international relations" and "lead to embarrassment in foreign affairs." 372 U.S. at 19, 83 S.Ct at 676.[3].

Turning to the merits, the Court must determine whether Goethe House will suffer irreparable harm if the Board is not enjoined, and either likelihood of success on the merits or "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in the movant's favor." *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 74 (2d Cir. 1985).

[2] A denial of injunctive relief, resulting in Goethe House's having to go forward with the representation election, would undoubtedly cause Goethe House irreparable harm in the sensitive area of foreign relations, since Goethe House's employment policies are controlled entirely by the German government, and could engender diplomatic embarrassment if the union prevailed in the election. Goethe House would be forced either to bargain with the union in contravention of some or all of the German government's personnel mandates or, alternatively, to obtain review it would have to commit an unfair labor practice under the National Labor Relations Act, 29 U.S.C. § 158(a)(5), such as refusing to bargain with the union as the employees' representative.

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[2] Moreover, Goethe House points out that the union seeking to represent its non-German employees is part of the AFL-CIO, which has declared its opposition to allegedly restrictive trade policies of various nations, including West Germany.

[3] Given the applicability of the *McCulloch* exception, the Court takes no position on the issue of whether the Board has acted beyond the scope of its statutory mandate so as to invoke the exception set forth in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

[3] Moreover, Goethe House has demonstrated a likelihood of success on the merits in this action. The Board contests Goethe House's claim that ordering representation proceedings would violate Goethe House's immunity from judicial or administrative proceedings as a foreign instrumentality under the FSIA, 28 U.S.C. § 1602 *et seq*. In support of its contention, the Board states that Goethe House cannot claim immunity because its activities in hiring non-German employees to perform clerical, administrative and maintenance functions fall under the commercial activity exception to immunity under 28 U.S.C. §§ 1603(d), 1605(a)(2).

The legislative history behind the FSIA states:

> [P]ublic or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.
>
> The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

H.R.Rep No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615.

It is however one thing to protect and preserve a remedy in American courts for an unpaid American vendor or employee by defining that relationship as a "commercial" exception, and on the other hand to justify thereby the right of a United States agency to intervene into the underlying employment structure of a conceded arm of a foreign state that is not involved in commercial activity. Support for this view is found in the fact that

courts which have found the commercial activity exception to exist in the employment context have done so as to employment contracts between the foreign state or instrumentality and a single individual. *See, e.g., Segni v. Commercial Office of Spain*, 650 F.Supp. 1042 (N.D.Ill.), *aff'd*, 835 F.2d 160 (7th Cir. 1987); *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F.Supp. 609 (S.D.N.Y.1978).*

In conclusion, plaintiff Goethe House, having demonstrated 1) that it will suffer irreparable harm in the absence of a preliminary injunction as well as 2) a likelihood of success on the merits of its claim that the "commercial activity" exception to sovereign immunity does not apply, the preliminary injunction is granted.

So ordered.

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* Compare cases in this Circuit and elsewhere which have applied the "commercial activity" exception to defeat immunity in contexts clearly "commercial" in totality: *State Bank of India v. NLRB*, 808 F.2d 526, 530 (7th Cir. 1986) (where foreign controlled bank performed same services as any American bank, was subject to federal and state banking regulations, and local managers made many decisions in bank's operation, NLRB jurisdiction upheld), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (breach of contract actions for sale of cement to foreign state held "commercial activity" and foreign state not immune), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982).

FOREIGN SOVEREIGN IMMUNITIES ACT
28 U.S.C. §§1602-1611

§1602. Findings and declaration of purpose

The Congress finds that the determination by Unites States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of

the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b) (1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

§1606. **Extent of liability**

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in

nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent

authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made –

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign State, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless

of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if –

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign State shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on

the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if —

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

NATIONAL LABOR RELATIONS ACT
29 U.S.C. §158(a)

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was

denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. §159

§159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropirate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropirate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no

labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no

case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

29 U.S.C. §§160(e),(f)

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the

modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(2)

Supreme Court, U.S.
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No. 88-1797

In the Supreme Court of the United States

OCTOBER TERM, 1989

GOETHE HOUSE NEW YORK, GERMAN CULTURAL CENTER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to review the National Labor Relations Board's direction of a representation election in a bargaining unit of petitioner's employees, where petitioner had an adequate means of obtaining review in the court of appeals under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 869 F.2d 75. The opinion of the district court (Pet. App. A16-A21) is reported at 685 F. Supp. 427. The underlying decision and direction of election by the Board (App., *infra,* 1a-15a) is reported at 288 N.L.R.B. No. 29.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1989. The petition for a writ of certiorari was filed on May 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Goethe House, is one of the six American branches of the Goethe Institute, a German nonprofit organization with 114 branches worldwide, which, under a contract with the Foreign Office of the Federal Republic of Germany (the Foreign Office), performs various functions in the area of German cultural foreign policy such as presenting and organizing cultural events, providing information on life in the Federal Republic of Germany, and promoting the German language. Petitioner's activities are controlled by the Foreign Office, and funding for the Goethe Institute is provided by the Federal Republic of Germany (App., *infra*, 3a-5a).

On March 5, 1982, District 65, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (District 65, or the Union) filed a representation petition seeking an election in a bargaining unit consisting of all employees of petitioner other than those represented by a German union,[1] excluding managerial, professional, and confidential employees, guards, and supervisors (App., *infra*, 3a, 14a). This unit includes a bookkeeper, assistant librarian, administrative assistant, and secretary (all in the Program Department), a messenger, a custodian, and a maintenance worker. All of these employees are either American citizens or third country nationals (App., *infra*, 5a & n.8).

In its Decision and Direction of Election issued on March 29, 1988, the Board found that petitioner's budget and operations indicated that it was engaged in commerce as defined in Sections 2(6) and 2(7) of the National Labor

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[1] Petitioner's employees who are German nationals are represented by a German union (App., *infra*, 3a n.4).

Relations Act, 29 U.S.C. 152(6) and (7)[2] (App., *infra,* 6a). The Board noted that it was not precluded from asserting jurisdiction over nonprofit educational institutions such as petitioner merely because they "do not engage in purely commercial activities" (App., *infra,* 6a n.9).

The Board dismissed petitioner's contention that its status as a foreign instrumentality excluded it from coverage under the Act (App., *infra,* 7a-13a). The Board found " 'no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in 'commerce' within the meaning of the Act' " (App., *infra,* 8a (citing *State Bank of India,* 229 N.L.R.B. 838, 841 (1977)). The Board distinguished *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional de Marineros,* 372 U.S. 10 (1963), on the ground that in those cases the Court had "declined to construe the Act as extending to the internal operations of foreign flagships employing alien seamen only temporarily located in the United States" (App., *infra,* 8a).[3]

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[2] Section 2(6) of the Act provides in part:

> The term "commerce" means trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State * * *.

Section 2(7) of the Act provides:

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

[3] The Board found more apposite *ILA Local 1416* v. *Ariadne Shipping Co.,* 397 U.S. 195 (1970), in which "the Court limited *Benz* and *McCulloch* to their facts in holding that a dispute centering on American longshoremen on American docks was outside the internal operations of the ship, and accordingly, was within the Board's jurisdiction" (App., *infra,* 8a-9a).

The Board then rejected petitioner's contention that its exercise of jurisdiction here would be inconsistent with the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611 (1982) (FSIA). Following *State Bank of India,* 229 N.L.R.B. at 842, the Board held that the legislative history of the FSIA indicated Congress's intent to preserve immunity only for the "public acts" of a foreign state (App., *infra,* 9a-10a). In the Board's view, neither the policy of the NLRA nor any general public policy militated against the exercise of jurisdiction over instrumentalities of foreign states conducting commercial activities in the United States (App., *infra,* 9a).

The Board further noted that the FSIA explicitly denies immunity to any foreign state in any case in which "the action is based upon a commercial activity carried on in the United States by the foreign state" (App., *infra,* 10a & n.13). See 28 U.S.C. 1605(a)(2). The Board acknowledged that petitioner's purpose was to implement foreign policy objectives of the Federal Republic of Germany by providing cultural services. But it pointed out that "[t]he FSIA defines a 'commercial activity' as meaning 'either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to (its) *nature* * * * rather than * * * its *purpose*' " (App., *infra,* 10a-11a (quoting 28 U.S.C. 1603(d)) (emphasis added by Board, footnote omitted)). In support of its conclusion, the Board cited the House Report on the FSIA, which stated "that 'employment or engagement of laborers, clerical staff or public relations or marketing agents' by a foreign government is an activity included within the definition of 'commercial activity' " (App., *infra,* 11a (quoting H.R. Rep. No. 1487,

94th Cong., 2d Sess. 16 (1976)).[4]

The Board directed that an election be held within thirty days of the issuance of its decision (App., *infra,* 14a).

2. Petitioner filed a complaint in federal district court seeking declaratory and injunctive relief against the Board's assertion of jurisdiction and direction of election. The district court issued a preliminary injunction prohibiting the Board from proceeding further with the representation proceeding or conducting an election (Pet. App. A17-A21).

Initially, the district court addressed the question whether the case was governed by the general rule that in order to challenge a Board direction of an election, an employer must "allow[ ] the representation election to go forward and, in the event that the union should prevail, refus[e] to bargain with the union as a prerequisite to * * * review [in the court of appeals]" (Pet. App. A18). The court held that, despite this rule, it had jurisdiction to review the Board's decision under *McCulloch* v. *Sociedad National, supra,* since the employment activities of Goethe House were "controlled entirely by the West German government" and thus "[r]equiring Goethe House to submit to NLRB jurisdiction might well conflict or otherwise interfere with the German government's employment objectives in implementing cultural foreign policy" (Pet. App. A18-A19). This "entanglement", the court held, permitted district court review in advance of the representation election (*ibid.*).

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[4] Moreover, the Board noted, the same Report went on to say that "public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States" (App., *infra,* 11a, quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976)).

The court then found that petitioner would suffer irreparable harm if required to comply with the Board's direction of election "since Goethe House's employment policies are controlled entirely by the German government, and could engender diplomatic embarassment if the union prevailed in the election. Goethe House would be forced either to bargain with the union * * * or, alternatively, to obtain review it would have to commit an unfair labor practice under the National Labor Relations Act * * * " (Pet. App. A19).

Finally, the district court held that petitioner likely would prevail on the merits because, under the FSIA, the Board could not "intervene into the underlying employment structure of a conceded arm of a foreign state that is not involved in commercial activity" (Pet. App. A20). According to the district court, the commercial activity exception under the FSIA has been found to provide jurisdiction only "as to employment contracts between the foreign state or instrumentality and a single individual" (Pet. App. A20-A21).

3. A divided court of appeals, concluding that the district court lacked jurisdiction to review the Board's direction of election, reversed its decision (Pet. App. A3).

The court of appeals noted that there have been only two cases in which this Court has found district court jurisdiction to review a Board representation proceeding: *McCulloch* and *Leedom* v. *Kyne,* 358 U.S. 184 (1958) (Pet. App. A6). The court of appeals explained that the "extremely narrow [*Kyne*] exception to the general rule that Board representation orders are not subject to direct judicial review" applies "[o]nly where the Board has clearly violated an express provision of the [NLRA]" (Pet. App. A6-A7, quoting 2 *The Developing Labor Law* 1717 (C. Morris 2d ed. 1983)). Because petitioner alleged that the Board's action violated the FSIA, and not an express

provision of the NLRA, the *Kyne* exception did not apply here (Pet. App. A7).

Nor, according to the court of appeals, was there any basis for district court jurisdiction under *McCulloch* (Pet. App. A8-A9), where the international protest provoked by the Board's assertion of jurisdiction over foreign seamen serving on a Honduran flag vessel had justified the district court's pre-election review. In *McCulloch,* the certification of an American union as representative of those seamen would have violated Honduran law (Pet. App. A8); the court saw no comparable situation here, where certification of District 65 "would neither encroach on the membership of a German union nor violate German law" (Pet. App. A8-A9).

The court of appeals also found the district court's concern about international embarassment to be "largely unfounded" (Pet. App. A9). It noted that "[e]ven if the Union were certified as the bargaining agent of Goethe House's non-German employees," and Goethe House would therefore have to bargain with the Union over wages, hours and other terms and conditions of employment, "Goethe House would have no duty to bargain over how it performed its mission of promoting German culture" (Pet. App. A9). The court also noted that the fact that the German employees of Goethe House were already unionized "belie[d] the prospect that the presence of a union for the non-German employees would hamper Goethe House's operations" and made less than "uniquely compelling" the argument that the West German Government needed "unilateral control" over the remaining, non-unionized employees (Pet. App. A9-A10).

The court refused to predicate any prediction of international embarassment on the possibility that petitioner's employees, if found subject to the Board's jurisdiction, might strike and picket. The court noted that petitioner's

employees would have the right to strike and picket irrespective of Board jurisdiction, and that the right to organize might lessen, not heighten, the possibility of strikes and picket lines (Pet. App. A10-A11).

Finally, the court of appeals found that this case differed from *Kyne* and *McCulloch* because the petitioner would be able to obtain review of the Board's representation decision in a refusal to bargain proceeding (Pet. App. A12). In *McCulloch,* this Court ruled only on a case brought by a union (which would not have had recourse to review through a refusal to bargain proceeding) and declined to review a case brought by an employer (which had recourse to indirect review) (*ibid.*).[5]

Judge Lumbard dissented. In his view, *McCulloch* stood for the "broad premise that conflicts with foreign sovereigns are to be avoided," and thus the issue of petitioner's immunity from Board jurisdiction under the FSIA should be "resolved speedily" (Pet. App. A14).

ARGUMENT

The decision of the court of appeals is correct. The court's denial of pre-election judicial review under the circumstances of this case does not conflict with any decision of this Court or of any other court of appeals. The decision does not address the merits of the Board's assertion of jurisdiction. Further review at this stage is therefore unwarranted.

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[5] In *McCulloch,* this Court declined to decide a companion case (*Empresa Hondurena de Vapores, S.A.* v. *McLeod,* 300 F.2d 222 (2d Cir. 1962)), which had been brought by the foreign employer that had been a party to the Board proceedings. Instead, the Court vacated the court of appeals' decision in *Empresa* with instructions to have the district court dismiss the foreign employer's complaint "in light of [the] decision in [*McCulloch*]" (372 U.S. at 22).

1. Petitioner contends (Pet. 8-9) that the court of appeals erred in concluding that this case does not fit within the *McCulloch* exception[6] to the rule precluding pre-election judicial review.[7] As the court of appeals concluded, however, this case does not implicate the concerns that animated the Court to sustain district court review in *McCulloch*.

In *McCulloch*, the Board had directed an election to determine the representational rights of "foreign seamen aboard vessels under foreign flags" and the Board's action already had "aroused vigorous protests from foreign gov-

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[6] Petitioner correctly declines to press the claim that the Board acted in excess of its statutory mandate within the meaning of *Leedom* v. *Kyne* in exercising jurisdiction here. Nothing in the Act or its legislative history indicates that Congress intended to exempt from the Board's jurisdiction all activity in commerce by foreign nations. Section 2(2) of the Act, 29 U.S.C. 152(2), which defines "employer," does not exclude foreign nations or instrumentalities although it does exclude federal and state governments and instrumentalities. See *State Bank of India* v. *NLRB*, 808 F.2d 526, 530-532 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

[7] Representation proceedings conducted under Section 9 of the Act, 29 U.S.C. 159, do not result in a final order that is subject to judicial review. *AFL* v. *NLRB*, 308 U.S. 401, 409 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). Rather, certifications and other decisions issued in the course of such a representation case are subject to judicial review only in the courts of appeals and only in the context of a subsequent unfair labor practice proceeding – for example, when an employer refuses to bargain with the union certified by the Board and the Board finds that the refusal to bargain is an unfair labor practice under Section 8(a)(5) of the Act (29 U.S.C. 158(a)(5)) and issues a bargaining order. *Boire* v. *Greyhound Corp.*, 376 U.S. at 476-477. The final Board order in the unfair labor practice case is reviewable in the court of appeals, and the rulings made in the course of the underlying representation proceeding are reviewable in that context. Section 10(e) and (f) of the Act (29 U.S.C. 160(e) and (f)); *AFL* v. *NLRB*, 308 U.S. at 409; *Boire* v. *Greyhound Corp.*, 376 U.S. at 476-477.

ernments." The Court found that these circumstances presented "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power" (372 U.S. at 16-17).[8]

For several reasons, there is no similar "uniquely compelling justification" for departing from the statutory review provisions in this case. First, the concerns that led the *McCulloch* court to find district court jurisdiction at the pre-election stage are not present here. Thus, the court of appeals rejected the suggestion that the holding of a Board-supervised election might "cause disturbances and embarassment in international relations" (Pet. App. A9). The Federal Republic of West Germany, by letter to the Board, has indicated that it believes that the Board lacks jurisdiction and has noted that an assertion of jurisdiction by the Board raises questions of reciprocity concerning employees of American institutions in Germany. See App., *infra,* 1a n.1. Immediate pre-election review is not necessary to deal with that objection, however. In fact, petitioner's German nationals are represented by a German union; District 65, if certified, could not require petitioner to bargain over how it performed its cultural mission; and according petitioner's non-German employees representational rights would not increase the likelihood

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[8] After the *McCulloch* Court determined that the district court had properly asserted jurisdiction, it held on the merits that "the jurisdictional provisions of the [NLRA] do not extend to maritime operations of foreign-flag ships employing alien seamen" (372 U.S. at 13). The Court noted that Congress and the State Department, as well as settled principles of international law, recognized that the law of the "flag state ordinarily governs the internal affairs of a ship" (*id.* at 20, 21). The Court found no indication that Congress intended the NLRA to supersede the law of the flag state with respect to the labor relations of foreign crewmen on a foreign vessel (*id.* at 20).

that they would engage in potentially embarrassing strikes and picketing, for they already are empowered to engage in such activity by state and federal law. Pet. App. A9-A12.

Second, in this case, unlike *McCulloch* and *Kyne,* petitioner has a means of obtaining review in the court of appeals through the statutory review procedure (Pet. App. A12-A13). Until that review is completed, petitioner would be under no compulsion to bargain with the Union (assuming the union won the election and were certified). Thus, petitioner's apprehension (Pet. 11) that "the Board [will] * * * become involved in matters that are exclusively the concerns of a foreign sovereign"—by forcing petitioner to bargain with an American union and to submit to grievance and arbitration proceedings—is premature. Nor should such indirect review of the ultimate issue whether the Board properly exerted jurisdiction here occasion embarrassment in foreign affairs (see Pet. 7). A so-called "technical" refusal to bargain is the recognized method for an employer to challenge a Board representation decision (see note 5, *supra*). Indeed, the court of appeals' opinion states that petitioner must follow that procedure in order to obtain review under the American legal system.

2. There is no merit to petitioner's further contention (Pet. 10-11) that the court of appeals should have upheld the district court's exercise of jurisdiction because the FSIA precluded the Board's assumption of jurisdiction over petitioner.

The FSIA does not provide that foreign instrumentalities have absolute immunity from all legal actions in the United States. The premise of the FSIA is that the courts will determine whether, in the circumstances alleged, a foreign instrumentality is immune from suit. "[I]n order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to

'assur[e] litigants that * * * decisions are made on purely legal grounds * * * ' the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agents, or instrumentalities." See *Verlinden B.V.* v. *Central Bank of Nigeria,* 461 U.S. 480, 488 (1983). Thus when a civil action is brought against a foreign instrumentality, the court must determine whether the suit is one permitted by the Act.

Nothing in the FSIA changes the scheme of review established by Congress for Board representation proceedings. Petitioner raised its FSIA contentions before the Board, which gave them full consideration (App., *infra,* 9a-13a). Petitioner will have an opportunity to obtain court of appeals review of the Board's rejection of its FSIA claims should the Union prevail in the representation election and a bargaining order issue against petitioner. Cf. *State Bank of India,* 808 F.2d at 534-535.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

APPENDIX

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

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288 NLRB No. 29 Case 2–RC-19263

GOETHE HOUSE NEW YORK, GERMAN CULTURAL CENTER, EMPLOYER

and

DISTRICT 65, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition for representation filed March 5, 1982, under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Wendell Shepherd on various dates between March 29 and April 27, 1982. Following the hearing and pursuant to the Board's Rules and Regulations, and by direction of the Regional Director for Region 2, this proceeding was transfered to the Board for decision. Thereafter, briefs were filed by the Employer and the Petitioner.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

On the entire record[1] in this case, the Board makes the following findings.

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[1] The Employer has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Ambassador to the United States of the Federal Republic of Germany submitted directly to the Board an "advisory opinion" in

I. The Board's Jurisdiction

The parties stipulated that the Employer, Goethe House New York, German Cultural Center, is one of 114 worldwide branches of the Goethe Institute located in Munich, Germany. The Goethe Institute is a nonprofit organization sponsored by the Foreign Office of the Federal Republic of Germany. Goethe House New York is a center for cultural, educational, and informational exchange. It performs these functions on behalf of the Federal Republic of Germany pursuant to an agreement between it and the Geothe Institute. The six branches of the Goethe Institute that operate in the United States, including Goethe House New York, have an annual aggregate budget in excess of $1 million, which is funded directly by the Federal Republic of Germany.

The Employer contends that the Board is without jurisdiction in this proceeding because it is an agency of the Federal Republic of Germany engaged in traditional sovereign activities of a noncommercial nature and thus is exempt from our jurisdiction under traditional international law principles of sovereign immunity, particularly as codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq. The Petitioner argues that the Employer is a private organization under German law and subject to the Board's jurisdiction. The Petitioner contends that such nongovernmental organizations funded in whole or in part by foreign governments are statutory employers because they do not fall within any of the ex-

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this matter on behalf of the Federal Republic's Foreign Office. We further acknowledge receipt from the Employer of a decision by the New York State Division of Human Rights declining to assert jurisdiction over the Employer.

ceptions contained in Section 2(2) of the Act.[2] The Petitioner relies on *State Bank of India*, 229 NLRB 838 (1977),[3] as followed in *German School of Washington, D.C.*, 260 NLRB 1250 (1982). The Petitioner seeks to represent all employees not otherwise covered by a collective-bargaining agreement with a German union[4] or any other union. The Petitioner further contends, contrary to the Employer, that there are no issues here with "sensitive" international or diplomatic ramifications.

For the reasons set forth below, we shall assert jurisdiction over the Employer's operations.

A. *The Nature of the Employer's Operations*

The record shows that Goethe House New York is one of six branches of the Goethe Institute located in the United States. Goethe House New York is not incorporated or licensed to do business in New York State. The Foreign Office of the Federal Republic of Germany has by contract[5] delegated to the Goethe Institute, a "registered society" under German law, and through it to Goethe

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[2] In defining the term "employer," Sec. 2(2) of the Act excludes, in relevant part, only the following governmental entities, "the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . . ."

[3] Hereinafter referred to as *State Bank of India I*. Subsequent to the transfer of this proceeding to the Board, the Board relied on *State [Bank of India] I* in deciding *State Bank of India*, 273 NLRB 264 (1984), and 273 NLRB 267 (1984), enfd. 808 F.2d 526 (7th Cir. 1986). We shall refer to the two latter cases as *State Bank of India II*.

[4] The employees of the Employer who are German nationals are represented for collective-bargaining purposes by a German union under German law.

[5] The current contract, or "Framework Agreement," was executed in 1976 for "an unspecified length of time." It may be terminated by either party "at the end of a year with twelve months notice."

House New York, several of its responsibilities in the area of German cultural foreign policy. These include presenting and organizing cultural events abroad, providing information abroad on cultural life in the Federal Republic of Germany, and promoting the German language abroad. As stipulated, other nations perform analogous functions directly through their foreign offices. The Employer's director testified that, while the Foreign Office retains responsibility for establishing and formulating cultural foreign policy, implementation of that policy has been delegated in part to the Goethe Institute. Each specific program proposed by Goethe House New York, for example, must first be submitted to the Federal Republic's New York Consulate, which has the authority to veto it. Further, essentially all funding for the Goethe Institute and its branches is derived from the Federal Republic of Germany. Goethe House New York engages in no fund raising activities in the United States and performs no services on behalf of any entity other than the Federal Republic of Germany.

Prior to the late 1960's the Foreign Office directly operated cultural centers in the United States. Since that time all such centers have been absorbed into the Goethe Institute. The Foreign Office, although retaining the authority to do so, has essentially ceased performing cultural functions not only in the United States but throughout the world. Senior officials of the Foreign Office and the Ministry of Finance are ex officio members of Goethe Institute's board of directors. Board decisions on who should be officers of the Institute and on policies viewed by the Foreign Office as impacting on German cultural foreign policy are subject to veto by the Foreign Office's representative.

To fulfill its mission, Goethe House of New York maintains a language department, cultural programs depart-

ment, and a library. The building in which these facilities are located is owned by the Federal Republic and Goethe House New York pays no rent. The mission of the language department is to provide information on teaching methods and materials and curriculum guidance to teachers of German. The cultural affairs department sponsors a wide ranging series of film showings, lectures, exhibitions, symposia, and similar events, many of which are cosponsored with American cultural organizations.[6] All Goethe House New York services and events, provided solely by it, including use of the 16,000 volume library, are available to the public free of charge.[7]

As set forth in the description of the stipulated unit in section III of this Decision and Direction of Election, the Petitioner seeks to represent essentially a residual unit of otherwise unrepresented employees.[8] Because, as noted at footnote 4 above, all employees who are German nationals are currently represented for collective-bargaining purposes by a German labor organization, the Petitioner's interest is only in employees who are either American citizens or third country nationals.

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[6] For example, Goethe House New York provided a grant of $5000 to a Seattle, Washington nonprofit theater group for its production of a German play. Also, Goethe House New York supported an exhibition by the International Center of Photography.

[7] Goethe House New York solicits a voluntary contribution of $1 from each filmgoer to defray costs to the film program. The money taken in through this effort amounts to approximately $1000 per year or less than .2 percent of the Employer's approximately $600,000-per-year budget for the New York operation.

[8] The Petitioner described the positions as the following: the bookkeeper, assistant librarian, administrative assistant in the Program Department, secretary in the Program Department, messenger, custodian, and maintenance person.

B. *The Board's Statutory Jurisdiction*

1. Monetary measure of the impact on commerce

At the hearing the parties entered into the following stipulation concerning the Employer's commerce statement:

> Goethe House New York, German Cultural Center, one of 114 branches of the Munich-based Goethe Institute for Promoting German Language Study Abroad and International Cultural Cooperation, is [a] nonprofit organization sponsored by the Foreign Office of the Federal Republic of Germany. Goethe House New York operates a center for cultural exchange and educational purposes and information. Goethe House New York performs these functions on behalf of the German government, pursuant to an agreement between the Goethe Institute and the Federal Republic of Germany. The six branches of Goethe Institute, including Goethe House New York, which operate in the United States, have an annual aggregate budget in excess of $1 million, all of which is derived from sources outside the State of New York, namely the Federal Republic of Germany.

These stipulated facts are sufficient to warrant our finding that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Employer's operations in the United States generally and at its New York, New York facility in particular are like those of a library and also similar to a foundation or educational institution contributing to the cultural and educational values of the community.[9] Although the

[9] In this regard, in *German School,* supra, 260 NLRB at 1252, the Board stated that it is not precluded from asserting jurisdiction over a nonprofit educational institution despite the fact that such institutions do not engage in purely commercial activities.

record does not establish any precise figures on direct or indirect inflow or outflow of goods or services, the receipt by Goethe Institute in the United States of more than $1 million directly from the Federal Republic of Germany meets the Section 2(6) test of commerce between "any foreign country and any State."[10] This demonstrates a substantial effect on commerce and establishes the required statutory jurisdiction of the Board. Further, because the stipulated receipt by the Employer of $1 million from the Federal Republic of Germany meets the Board's standard for assertion of jurisdiction regardless of which discretionary test is used, we find it unnecessary to decide which test is controlling.

2. Congressional intent respecting coverage of foreign instrumentalities as employers

The Employer contends that its status as a foreign instrumentality somehow excludes it from the coverage of the Act. We reject this contention. It is clear that the Employer does not come within any express statutory exclusion (see fn. 2, above, and *State Bank of India I*, 229 NLRB at 840).

The Employer argues, however, that given the record evidence that Goethe House New York, as a branch of the Goethe Institute, operates essentially as an administrative arm of the Federal Republic under the overall supervision of the Foreign Office the Employer is engaged in diplomatic activities of a sort that take it outside the reach of the Act as intended by Congress. In particular, the Employer relies on a series of cases dealing with foreign flagships, notably *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957); and *McCulloch v. Sociedad Nacional*

[10] As indicated above, the record shows that Goethe House New York's annual budget is approximately $600,000.

de Marineros, 372 U.S. 10 (1963), in which the Supreme Court declined to read the Act as extending to certain maritime operations of foreign flagships because, in the absence of an affirmative indication of congressional intent, it could not assume that Congress would have meant to authorize Board inquiries that would, of necessity, involve the "internal discipline and order" of a foreign vessel. *McCulloch*, supra, 372 U.S. at 19. For the reasons set out below, we find that the *Benz-McCulloch* rule does not apply here.

As the Board stated in *State Bank of India I,* discussed more fully below, the Board recognizes the canon of statutory construction that the Act is to be construed as "applying generally only to conduct taking place within, or having effect within, the territory of the United States." 229 NLRB 838, 841. It went on to state that "[w]ithin these boundaries, there is no basis for believing that the Act was intended to exclude any employees in our country whose employer in this country is an 'employer' engaged in 'commerce' within the meaning of the Act." Id. Thus, the Supreme Court in *Benz* and *McCulloch* declined to construe the Act as extending to the internal operations of foreign flagships employing alien seamen only temporarily located in the United States. The court of appeals, in enforcing *State Bank of India II,* pointed out (supra, 808 F.2d at 533-534) that the Supreme Court itself has narrowly construed the *Benz-McCulloch* rule in another case regarding the Board's jurisdiction over a foreign flagship, *Longshoremen ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970). In that case the Court limited *Benz* and *McCulloch* to their facts in holding that a dispute centering on American longshoremen on American docks was outside the internal operations of the ship, and accordingly, was within the Board's jurisdiction. *Ariadne* lends further support to our decisions in *State Bank of*

India I and *II* and to our holding in this case, where the activities of the Employer over which we have been requested to assert jurisdiction occur solely within the territory of the United States.

C. *The Board's Exercise of Discretionary Jurisdiction*

Having decided that the Board has jurisdiction under Section 2(2), (6), and (7) of the Act, we turn to the Employer's argument that the assertion of jurisdiction would nevertheless be wholly inconsistent with longstanding international law concepts of sovereign immunity and, in particular, contrary to the intent of the Foreign Sovereign Immunities Act (FSIA). This argument goes to whether, in our discretion, we should decline to exercise jurisdiction that we possess under the Act (i.e., the NLRA). In *State Bank of India I*, the Board considered both the policy of the Act and public policy with respect to foreign sovereign immunity and found no justification to decline jurisdiction over an employer which is an "instrumentality" of a foreign state in cases "affecting employees in our own country whose employer engages in commercial activity which meets the Board's jurisdictional standards for such enterprises." 229 NLRB at 842. For the reasons set forth below we find that *State Bank of India I* is controlling here.

Although the argument has been made that all acts of foreign states and their agents be accorded sovereign immunity, the Congress has explicitly rejected this absolute immunity doctrine. The legislative history of the FSIA indicates that the Act was introduced in accordance with the recommendations of the Departments of State and Justice, that it exhaustively considered the competing foreign policy concerns, and that it intended that sovereign immunity be granted only to the public acts of a

foreign state.[11] Although the FSIA was written to apply only to judicial proceedings, we see no basis for our substituting a contrary judgment on sovereign immunity claims made during the course of administrative proceedings before this Agency, particularly where such proceedings ultimately are subject to court view by the Federal courts of appeals, in which the FSIA is fully applicable.

Accordingly, we shall continue to follow the principles established in *State Bank of India I* for resolving sovereign immunity claims where the employer is otherwise engaged in commerce within the meaning of Section 2(2) and (6) of the Act. Thus, although we do not dispute the Employer's claim that it is an agency or instrumentality of the Federal Republic of Germany, and thus within the meaning of a "foreign state" as defined by the FSIA,[12] this alone is not sufficient to establish an unrestricted entitlement to sovereign immunity. In relevant part, the FSIA states that a foreign state shall not be immune in any case in which "the action is based on a commercial activity carried on in the United States by the foreign state."[13] The FSIA defines

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[11] H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S. Code Cong. and Ad. News 6604-6605. Because there was no conference committee report and the House bill was passed in lieu of the Senate bill, subsequent references will be to the House Report.

[12] Under Sec. 1603(b) of the FSIA, an "agency or instrumentality" is any entity which is a "separate legal person, corporate or otherwise," an "organ of a foreign state," and not incorporated in a State of the United States or "created under the laws of any third country." Goethe House New York, as a private society under German law which is not incorporated in any State of the United States and which acts as the exclusive contractual agent of the German government to carry out activities in conformity with the German government's cultural foreign policy meets all of these tests.

[13] Sec. 1604 [*sic*].

a "commercial activity" as meaning "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to (its) *nature* . . . rather than . . . its *purpose*."[14] (Emphasis added.)

The legislative history of the FSIA provides further guidance to the proper meaning of "commercial activity" and indicates that the statute was intended to deny sovereign immunity to certain labor disputes involving foreign government employers. First, the House Report on the FSIA[15] states that "employment or engagement of laborers, clerical staff or public relations or marketing agents" by a foreign government is an activity included within the definition of "commercial activity." An even stronger indication is the following statement in the House Report: "Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States."[16]

As set forth elsewhere in this Decision and Direction of Election,[17] the employees for whom the Petitioner had filed a representation petition fit almost exactly within these examples of nonexempt "commercial activity" under the FSIA. The Petitioner specifically does *not* seek to represent those employees of Goethe House New York who are German nationals, some of whom carry diplo-

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[14] Sec. 1603. For the purpose of construing the meaning of "commercial activity" within the meaning of the FSIA in order to give proper effect to sovereign immunity claims under that Act, we note that this term need not be identical in meaning of the terms "commerce" and "affecting commerce" under Sec. 2(6) and (7) of our Act.

[15] H.R. Rep. No. 94-1487, supra at 16 (1976).

[16] Id.

[17] See secs. I,A and III.

matic passports, and are subject to German labor laws covering union representation and collective bargaining. The unit petitioned for covers only those employees, most of whom are in clerical or maintenance positions, who are either "American citizens or third country nationals." Thus, under the facts of this case, we find that Congress intended that the Federal Republic of Germany not be entitled to sovereign immunity for the "commercial activity" of employing the employees at issue in this case.

We do not question the Employer's claim that its overall purpose in directly providing cultural service and of subsidizing the cultural programs of American employers is to implement certain foreign policy objectives of the Federal Republic. Further, we agree that the employees whom we now hold are entitled to the protection of the Act provide services in support of those diplomatic aims. However, entitlement to sovereign immunity depends on the nature, not the purpose of the activities in question. 28 U.S.C. § 1603(b). The records shows that Goethe House New York carries out its functions by, in addition to employing the employees discussed above, purchasing office supplies, books, and periodicals for its library and language department. It enters into contracts, or "letters of agreement," with American cultural institutions, such as museums, theaters, film societies, and universities to provide financial support for specific programs which it cosponsors. In all these activities Goethe House New York acts as a commercial entity, not as a sovereign.[18]

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[18] The House Report indicates that 'the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. . . . Such contracts should be considered to

We conclude that our determination of the Employer's sovereign immunity claim, made in conformance with the FSIA, effectuates the policies of both the Act and the FSIA. Thus, in asserting jurisdiction over the Employer, we reject the Employer's claim that we are acting contrary to the "intent" of the FSIA. Rather, we act in accordance with the principles of sovereign immunity codified in the FSIA.[19]

II. The Labor Organization

District 65, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. The Appropriate Bargaining Unit

At the hearing the parties stipulated, and accordingly we find, that the following employees constitute a unit ap-

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be commercial contracts, even if their ultimate object is to further a public function." H.R. Rep. No. 94-1487, supra at 16.

[19] Because the Federal Republic of Germany is not an exempt entity within the meaning of Sec. 2(2) of the Act and because it is not entitled in this case to sovereign immunity under the FSIA, we find it unnecessary to determine whether assertion of jurisdiction is appropriate under the doctrine relating to exempt entities set forth in *National Transportation Service,* 240 NLRB 565 (1979). In *Res-Care, Inc.,* 280 NLRB No. 78 (June 24, 1986), we clarified the principles of that case and reaffirmed its basic test for determining when assertion of jurisdiction over an employer providing services to an "exempt" entity is appropriate. We therefore also find it unnecessary to rely on the *National Transportation* analysis in *German School of Washington, D.C.,* 260 NLRB 1250 (1982).

propriate for the purpose of collective bargaining within the meaning of the Act.

> All employees employed by Goethe House New York, German Cultural Center, excluding those employees covered by collective bargaining agreements with a German union or any other union, managerial employees, professionals, confidential employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be held among the employees in the unit found appropriate, as early as possible but not later than 30 days from this date. The Regional Director shall supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before this date, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by District 65, International Union, United Aerospace and Agricultural Workers of America (UAW), AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C., March 29, 1988

James M. Stephens, Chairman

Marshall B. Babson, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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